

Cartography, Empire and Copyright Law in Colonial Australia

Isabella Alexander

Recent scholarship has established the centrality of maps and mapmaking to the imperial project, both as expressions of surveillance, spatial construction and control, as well as in the role maps played in making and supporting claims of property and ownership. Much less attention has been paid to the question of ownership in the map itself. This is important because the person, or entity, who owned the map could determine how the land depicted in the map was portrayed, and how access to that information was disseminated. It also affected how the map was perceived in terms of the authority, or accuracy, of its claims. This article examines several disputes that arose in colonial Australia over the ownership of maps, exploring how different interests arose and came into conflict in relation to their control, dissemination and commercialisation. It suggests that a consideration of these cases reveals the role that copyright law played as a technology of empire.

Reading the history of colonial Australia, it is hard to escape the conclusion that '[o]ne way or another, almost everything about the history of the Australian colonies was about land'¹. It is a story of dispossession and possession: the indigenous inhabitants were dispossessed, so that the land could be possessed first by the Crown and then by private parties.

Possession turned into ownership by operation of the laws that the new arrivals brought with them. But for land to be possessed and owned, it had to be known, and at the end of the eighteenth century the chief method for acquiring knowledge of land was by surveying and mapping it. The First Fleet included amongst its diverse and disparate cargo a Surveyor-General to be on hand at the inception of this newest outpost of Empire for this very purpose.

* I am grateful for the support provided by the State Library of New South Wales. This article was prepared during my NSLA Honorary Fellowship 2017. Thank you to Kathy Bowrey, Jill McKeough and Ana Vrdoljak for comments on earlier drafts, to the anonymous reviewers for their helpful feedback, and to Kosta Hountalas and James Parish for research assistance. Depositories for archival sources are abbreviated as follows: SLNSW=State Library of New South Wales; PROV=Public Records Office of Victoria; PRO=Public Records Office of the UK, National Archives, Kew, London; NAA=National Archives of Australia.

¹ Alison Bashford and Stuart Macintyre, 'Introduction' in *The Cambridge History of Australia Vol I*, ed. Alison Bashford and Stuart Macintyre (Port Melbourne: Vic Cambridge University Press, 2013), 3.

There is a growing body of scholarly work on the powerful roles played by surveys and maps. Critical geographers have drawn on a range of theorists, including Jacques Derrida, Roland Barthes and Michel Foucault, to argue that maps are neither neutral nor value-free, but rather forms of knowledge and power, or that they are social, economic and political constructs.² The role of maps in state governance and administration has been noted,³ as has the affirmatory relationship between land surveys and modern property law.⁴

In recent decades, many scholars have noted the centrality of mapping to the imperial project as an elemental expression of surveillance, spatial construction and control. Maps are positioned as central to establishing claims of possession of territories and the ownership of land within territories. Matthew Edney observes that '[m]aps have served as a primary technology of governance since the early modern era, regardless of the nature of that technology'.⁵ In the case of empire, maps are essential to constructing space in terms of imperial territory, and the discursive construction of empire prefigures its physical construction. Indeed, Edney goes so far as to claim that "'Empire" is a cartographic construction; modern cartography is the construction of modern imperialism'.⁶ Legal scholar Shaunnagh Dorsett has further described the scopic view such maps provide as essential to the claiming of sovereignty. Dorsett observes that 'The practice of mapping makes possible the existence of the legal concept of territory', and continues: 'As a technology of

² See for example, J. B. Harley, 'Map, Knowledge, Power' in *The New Nature of Maps*, ed. Paul Laxton (Baltimore: John Hopkins University Press, 2001), 51-83; Denis Wood, *The Power of Maps* (New York: Guilford Press, 1992); John Pickles, 'Text, Hermeneutics and Propaganda Maps' in *Writing Worlds: Discourse, text and metaphor in the representation of landscape*, eds. Trevor J. Barnes and James S. Duncan (London: Routledge 1992), 193-230.

³ For example, Roger J. P. Kain and Elizabeth Baigent, *The Cadastral Map in the Service of the State* (Chicago: University of Chicago Press, 1992).

⁴ See, in particular, Alain Pottage, 'The Measure of Land' (1994) 57 *Modern Law Review* 361.

⁵ Matthew H. Edney, 'The Irony of Imperial Mapping' in *The Imperial Map: Cartography and the Mastery of Empire*, ed. James R. Akerman (Chicago: University of Chicago Press, 2009), 11-47, 11.

⁶ Edney, 'The Irony of Imperial Mapping', 45.

jurisdiction, mapping allows space to be reconceptualised as place, allows the assertion of jurisdiction over far-flung horizons and – along with its counterpart technology, surveying – allows the legal space of jurisdiction to be mapped on to the physical space of land and sea.⁷ Similar claims have been made about the law of property. As Nicole Graham has observed, '[t]he appropriation of land was the means and ends of British colonisation. Property law was thus, from the outset, the key technology of the entire colonial project'.⁸

In the Australian context, scholarship on maps and colonialism is often directly or indirectly concerned with indigenous rights. For example, Simon Ryan has described the ways that maps of Australia's interior erased Aboriginal occupation and ownership through presenting the interior as blank space that needed to be filled by the 'discoveries' of the European explorers.⁹ However, despite the centrality of maps to the scheme of property rights depending on them, much less attention has been paid to the conditions in which such maps were made, beyond describing the travels and travails of the early explorers.

These maps and surveys of territory were expensive and difficult to create; they required special skills in terms of surveying and draughtsmanship, copies had to be made, meaning paper was needed, as was a reproductive technology, such as copper plate and a printing press or, later, a lithographic press, and additional skilled workers, such as engravers, printers and colourists. In the mid-eighteenth century, copyright legislation was passed in Great Britain which allowed those who invested in making such maps to prevent others

⁷ Shaunnagh Dorsett, 'Mapping territories', in *Jurisprudence of Jurisdiction*, ed. Shaun McVeigh (New York: Routledge-Cavendish, 2007), 138.

⁸ Nicole Graham, *Landscape: Property, Environment, Law* (Abingdon Oxon: Routledge, 2011), 104.

⁹ Simon Ryan, *The Cartographic Eye: How Explorers Saw Australia* (Hong Kong: Cambridge University Press, 1996), Ch 4. See also Alexander Reilly, 'Cartography, Property and the Aesthetics of Place: Mapping Native Title in Australia' *An Aesthetics of Law and Culture: Texts, Images and Screens* 34 (2004) 221-239.

from making and selling unauthorised copies.¹⁰ The chief object of such legislation was to protect the commercial interests of mapmakers and map sellers (alongside makers and sellers of other types of engravings). However, this article argues that in the context of mapmaking in colonial Australia, copyright laws also acted as a technology of empire, through encouraging and validating the map-making that underpins imperial claims of territory and imperial constructions of property rights, but also through re-inforcing the ideology of empire.

This article explores the role of copyright law in imperial map-making through three case studies, all arising out of unauthorised copying of maps in the mid-nineteenth century. The first, and central, case study takes place in the 1830s and involves Thomas Livingstone Mitchell's famous Map of the Nineteen Counties. This map led to protracted argument between Mitchell and the Colonial Office over the rights to reproduce and sell copies of the map, as well as a case of alleged copying by a subordinate surveyor. In this case, the shadow of British copyright law informs the dispute without ever being directly invoked. The second case arises in 1853 and relates to unauthorised copying of a commercial map of the goldfields, which prompts its maker to call for copyright legislation in the colony of Victoria. The third case involves a dispute over unauthorised copying of another goldfields map, but by that time local copyright legislation had been passed and the dispute was brought before the court in 1872. Copyright law is framed in each case in slightly different ways, and indeed the precise contours of the issues shift as conditions in the colonies change.

¹⁰ *An Act for the encouragement of the Arts of designing, engraving and etching historical and other Prints, by vesting the Properties thereof in the Inventors and Engravers, during the Time therein mentioned* 8 Geo II c. 13 (1735); *An Act to amend and render more effectual an Act made in the eighth Year of the Reign of King George the Second, for Encouragement of the Arts of Designing, Engraving and Etching Historical and other Prints; and for vesting in, and securing to Jane Hogarth, Widow, the Property in certain Prints* 7 Geo III c. 38 (1767); *An Act for more effectually securing the property of prints to inventors and engravers, by enabling them to sue for and recover penalties in certain cases* 17 Geo III c. 58 (1777).

However, the underlying tensions between control, dissemination, commercialisation and access that characterise copyright law remain.

Controlling Mitchell's Map of the Nineteen Counties

From the very beginnings of European settlement in Australia, the Europeans sought to acquire knowledge of the land through survey and mapping. Governor Phillip's Instructions permitted him to grant land to deserving former convicts and marines who had completed their service. Augustus Alt travelled with the First Fleet as first Surveyor-General, whose job it would be to survey and mark out the allotted land.¹¹ Phillip made his first grants in 1792. Ex-convict James Ruse famously received the first land grant of thirty acres, and the official grant itself described Experiment Farm as 'laying on the south side of the Barrack Ponds at Parramatta'.¹² Even this rudimentary early form of land description demonstrates that some knowledge of the land in question was required in order for the grant to be made. James Drown describes several incidents in the early decades of the nineteenth century in which surveyors exceeded their authority, as well as other cases, such as the publican who had obtained an official map approved by Macquarie and used it to allocate land to local inhabitants.¹³ Drown also observes that the draftsman and engraver Peter Bemis was dismissed in 1831 for providing a map to a private party who then used it to sue the government – this was labelled 'highly improper conduct'.¹⁴

¹¹ Phillip's Instructions 25 April 1787, Historical Records New South Wales (HRNSW) vol. 1, part 2, 90; Phillip's Additional Instructions, 20 August 1789, HRNSW vol. 1, part 2, 256-7.

¹² DLMSF 37 (Safe), SLNSW, available at http://www2.sl.nsw.gov.au/archive/discover_collections/history_nation/agriculture/life/land_grants/index.html# (last accessed 28 July 2017).

¹³ James Drown, 'An apparatus of empire: The construction of official geographic knowledge in the survey departments of NSW and Van Diemen's Land 1788-1836' (PhD thesis, University of Sydney, 2012), 157-8.

¹⁴ Drown, 'Apparatus of empire', 158-9.

These incidents reveal that the need or desire to control access to this knowledge of land grants was quickly apparent in dealings between colonial governors, the Crown surveyors and private settlers. The most significant conflicts, however, arose during Thomas Livingston Mitchell's tenure as Surveyor-General.

Thomas Livingston Mitchell was the fourth Surveyor General of NSW. He arrived in NSW in 1827, first as assistant surveyor-general, but very soon rising to Surveyor-General upon the death of the incumbent, John Oxley, in May 1828. An ambitious and frequently jealous man, Mitchell was to clash with all the governors he served under, but initially his relations with Governor Darling were good. Even before taking on the position of Surveyor-General, he had embarked upon the first trigonometrical survey of the colony, measuring two baselines in April 1828 on the beach at Botany Bay.

The survey responded to the King's Instructions of 1825, which had instructed the governors of NSW and Van Diemen's Land to appoint 'Commissioners of Valuation' to carry out a general survey of their territories, and divide them into counties, hundreds and parishes. Once divided up, the land would be auctioned off to prospective settlers.¹⁵ This new policy arose out of Commissioner Bigge's inquiries and recommendation that 'to remove the difficulties and confusion that have hitherto existed in the choice of land, and will prevent those heavy arrears in the office of the Surveyor-General that have obstructed the speedy location of it, a systematic survey of the Colony should be carried out'.¹⁶ Bigge's recommendations were in turn responding to the failure of the original land policy of official

¹⁵ Drown, 'Apparatus of empire', 31.

¹⁶ 'Report of the Commissioner of Inquiry on the state of agriculture and trade in the colony of New South Wales', 136 Parliamentary Papers (London: House of Commons, 1823) 42.

grants. The opening up of land to the west of the Blue Mountains, with its rich pastures for cattle, encouraged ever growing numbers of settlers to venture further and further from the hub of central colonial power in Sydney. Increasingly, they took up land without waiting for official grants – thus becoming known as squatters. Governor Darling sought to control expansion by setting ‘limits of location’ – an official boundary beyond which nobody should settle – in 1826 and expanding them further in 1829 into the area known as the nineteen counties.¹⁷ However, very little of this area had been formally surveyed and Darling hoped that the arrival of Mitchell, as well as his requested additional surveying staff, would provide new impetus for the undertaking.¹⁸

The survey of the nineteen counties thus responded to the desire of the imperial power not only to be able to take a scopic view of its possessions, but also its need to exert control over a colonial population taking land policy into its own hands. The practice of squatting within and beyond the limits of location presented a threat to the ideal of imperial governance and its ability to impose British property law on its new possessions. The authority of the survey, and its ability to carry out these objectives, would be established by its scientific credentials. These in turn would be established by deployment of the best and most modern technology: the trigonometrical survey. By this time, Britain had subjected, or was in the process of subjecting, a number of its territories to trigonometrical surveys: the Trigonometrical Surveys of Britain (begun in Scotland in 1791), and Ireland, as well as the Great Trigonometrical Survey of India. However, as Edney convincingly establishes in

¹⁷ Lisa Ford and David Andrew Roberts, ‘Expansion, 1820-50’ in *Cambridge History of Australia* ed. Bashford and McIntyre, 130.

¹⁸ Stephen H Roberts, *History of Australian Land Settlement 1788-1920* (Melbourne: Macmillan, 1968), 31; Foster, *Sir Thomas Livingston Mitchell*, 198-9.

relation to the latter, the British could never fully implement the technological ideal in practice, for reasons institutional, financial, geographical and cultural.¹⁹

These problems were reflected in New South Wales and the contradictory positions taken as to the trigonometrical nature of Mitchell's survey over time. Importantly, Mitchell always saw himself as a man of science. Although from a fairly modest background, Mitchell had been educated in the classics and was proficient in the sciences, including mathematics.²⁰ Trained also in modern surveying methods, Mitchell considered that the King's Instructions necessitated a general topographic survey, carried out within a trigonometric framework.²¹ For Mitchell, the position of Surveyor General was a stepping stone to greater fame, and created a tension between his public duties and his private ambition. Mitchell longed to distinguish himself as an explorer, who would lay down his discoveries with greater accuracy than his predecessor Oxley, and his contemporary, Sturt. Drown notes that Mitchell also had professional reasons for wishing to undertake a trigonometrical survey, having recently published in London a technical treatise explaining the principles of a trigonometrical survey, and demonstrating awareness of similar surveys, such as that taking place in Ireland.²² Mitchell, therefore, represented to Governor Darling that a trigonometrical survey would be required for this project and Darling authorised him to carry it out.²³ As Darling wrote to Huskisson in 1828, 'Major Mitchell is decidedly of opinion that a Trigonometrical

¹⁹ Matthew Edney, *Mapping an Empire* (Chicago: University of Chicago Press, 1997).

²¹ 'On the Trigonometrical Survey of New South Wales' *New South Wales Magazine*, August 1833, extracted in Alan E. J. Andrews, *Major Mitchell's Map* (Sandy Bay, Tasmania: Blubber Head Press, 1992), 340. As observed by Andrews, although the article has no author, it is quite obviously written by Mitchell.

²² T. L. Mitchell, *Outlines of a System of Surveying, for Geographical and Military Purposes, Comprising the Principles on which the Surface of the Earth may be Represented on Plans* (London: Samuel Leigh, 1827); Drown, 'Apparatus of empire', 173. Mitchell compared the demands of his survey with that occurring in Ireland in his Memorandum to Darling of 29 April 1828, *HRA: Series 1*, vol. 14, 178-9.

²³ Drown, 'Apparatus of empire', 171-2.

Survey should be immediately commenced as a Necessary foundation to the more particular Survey of the Colony'.²⁴

However, the question of whether Mitchell had in fact been requested or authorised to carry out a detailed trigonometrical and topographical survey would become contentious as the years dragged on and the costs mounted. In 1831, Governor Darling complained to Under-Secretary Hay that he had been unable to obtain a map of the Colony from Mitchell, stating that 'though I have repeatedly mentioned to him personally the inconvenience and embarrassment I feel, having nothing better to refer to when Settlers come to speak about their Land, than a common Map of Arrowsmith's which I brought out with me'.²⁵ In 1833, just as the map was in its final stages of completion, a despatch arrived from the Secretary of State, Stanley, bringing news of regal dissatisfaction. Stanley sought to convey to Mitchell 'the King's surprise and disappointment, that the progress,' which Stanley said had been 'made in the survey of the Colony (so far at least as can be ascertained from any reports, which have, as yet, been received of his operations) should have been so disproportioned to the means, which have been placed at his [Mitchell's] disposal.'²⁶ Stanley explained that the King's Instructions had only required a general survey 'limited to the purposes connected with the location of settlers' and roads, rather than a trigonometrical survey which was 'a scientific operation of great difficulty and requiring much more time and labour that would be necessary'.²⁷

²⁴ Darling to Huskisson, 13 May 1828, *HRA: Series 1*, vol. 14, 176.

²⁵ *HRA: Series 1*, vol. 16, 222.

²⁶ Stanley to Bourke, 15 June 1833, *HRA: Series 1*, vol. 17, 142.

²⁷ *Ibid*, *HRA: Series 1*, vol. 17, 144.

Mitchell was enraged by Stanley's complaints and wrote a lengthy rebuttal which was despatched by Bourke on 10 October 1834 – several months after the map itself had been sent. When sending the map Mitchell had presented it as 'the result of a Trigonometrical survey made by me'.²⁸ However, in his rebuttal he seems to have retreated from this position. In his letter enclosing Mitchell's defence, Bourke noted that he concurred with Mitchell 'in representing that nothing, which can with any propriety be called a trigonometrical survey of the same kind formerly conducted in England by Mudge and Dalby and now in progress under Colonel Colby in Ireland has been or could be attempted here.'²⁹ However, as Bourke stated, Mitchell had constructed a map 'sufficiently correct for ordinary purposes', despite the fact that its small scale meant it was less useful to residents of the colony seeking certainty about their property boundaries.³⁰ Bourke's letter enclosing Mitchell's defence largely supported Mitchell's claims that his duties had been extensive and both time and labour-consuming.³¹

The issue of whether Mitchell had or had not been authorised to carry out a proper trigonometrical survey (leaving aside the question of whether such a thing was even possible at the time) was relevant because of the considerable amount of time it had taken and its cost to the Colonial Office. But as noted above, Mitchell had a personal investment in the map as well. While he owed his position in New South Wales to his military connections

²⁸ *HRA: Series 1*, vol. 17, 422.

²⁹ Bourke to Stanley, 10 October 1834, *HRA: Series 1*, vol. 17, 551.

³⁰ *Ibid*, *HRA: Series 1*, vol. 17, 551. Mitchell later explained that the map had to be done on a small scale due to the difficulty in obtaining copper. Votes & Proceedings, Legislative Council NSW, 1855, vol. 2, *Report of the Commissioners appointed to inquire into the Surveyor General's Department*, 'Evidence', 9.

³¹ By this stage, Mitchell had also fallen out with Bourke, describing him in a letter to his brother as a Whig 'incubus' set upon blighting the 'budding energies of this youthful colony.' Mitchell to John Mitchell, 30 March 1835, *HRA*, Mitchell, Sir T. L., Papers 1830-1839, CY Reel 243, Vol 3 A292, 247.

forged in the Peninsular War, connections maintained throughout his life,³² of equal importance to him was his participation in scientific networks.³³

The challenges Mitchell had to overcome to produce the Map of the Nineteen Counties further testifies to his pride in his professional reputation and personal ambition.³⁴ To print the map in Sydney, Mitchell had used copper removed from the bottom of ships and he had engaged John Carmichael to engrave it. In October 1833, Mitchell had written privately to Hay, informing him he would like to dedicate his map to Edward Stanley, the Secretary of State, and asking Hay if he could obtain Stanley's permission to do so.³⁵ This was a shrewd (if not uncommon) political move, and may also have been aimed at tempering Stanley's displeasure.³⁶ By 1834, Mitchell had spent 900 pounds of his own money on the map and was in serious financial difficulties. He had also incurred significant costs in setting up his brother Houston on a farm in New South Wales, and in building a large and impressive house in Sydney. His solution was to seek permission from Governor Bourke to print and publish copies of his map for his personal profit. Bourke, however, refused to grant Mitchell permission to print the map and sell it for his own profit, claiming such permission had to come from the Colonial Office. When Bourke was finally able to send a copy of the map to Stanley in May 1834, the Governor sought that permission and informed Stanley that

³² Zoe Laidlaw, *Colonial Connections, 1815-45: Patronage, the information revolution and colonial government* (Manchester University Press, 2005), 21-27.

³³ *Ibid*, 31.

³⁴ Drown, 'Apparatus of empire', 173.

³⁵ Quoted in Foster, *Sir Thomas Livingston Mitchell*, 205.

³⁶ Mitchell later commented: 'I was so anxious to escape the blame that had been cast upon me, that I dedicated the map to Mr Stanley, although it may be supposed I was not pleased at being charged with having trifled away and wasted my time; still, I thought it a compliment due to him'. Votes & Proceedings, Legislative Council NSW, 1855, vol. 2, *Report of the Commissioners appointed to inquire into the Surveyor General's Department*, 'Evidence', 5.

Mitchell proposed to print two hundred copies in Sydney and send them to London for sale in around two months' time.³⁷

By 1834, Mitchell had approached James Gardner, an engraver of Regent Street, as his London publisher.³⁸ The choice of Gardner further emphasises Mitchell's ambitions for his map. Gardner was the sole agent of the Ordnance Survey and a founding fellow of the Royal Geographical Society. But while he waited for the Colonial Office's response, Mitchell could do nothing and his financial situation was becoming increasingly desperate. He wrote to his brother John to explain why he could not send any money back to his mother:

To the publication of this map I was looking for abundance of cash for every thing – “I built, I improved, I planted” – when lo! The Governor told me on the eve of publication – that I must have the Secretary of State's permission - ! That has thrown me back more than a year and embarrassed me sadly – my house at Craighend is mortgaged – for £1000. In the meantime a highly finished map, of which I have 1000 copies ready for sale (at 30^s/ in 3 sheets) lies useless to me or to the public – Such is your vile canting Whig economy!³⁹

The displeasure of Stanley and the King might well have led to a rejection of Mitchell's request. Moreover, his action in printing the map himself in Sydney was in breach of Goderich's clear instructions back in 1831 that Bourke should send maps and geographical details back to London to assist the Hydrographer of Colonial Office in preparing 'a general

³⁷ Bourke to Stanley, 5 May 1834, *HRA: Series 1*, vol. 17, 419.

³⁸ Mitchell to Macleay, 23 September 1834, *HRA: Series 1*, vol. 17, 544.

³⁹ Mitchell to John Mitchell, 30 March 1835, Mitchell, Sir T. L., Papers 1830-1839, CY Reel 243, Vol. III A292 (SLNSW), 247.

map of the Colony, the want of which has hitherto been seriously felt'.⁴⁰ Mitchell justified this to Bourke's secretary on the basis that the engraving needed to be done under his direct supervision in order to be done properly.⁴¹

Fortunately for Mitchell, however, at the time his request was forwarded by Bourke, the office of Secretary of State was being temporarily occupied by the Duke of Wellington. Once again, Mitchell's military connections worked in his favour. Wellington was familiar with Mitchell and his work surveying the battlefields in Spain and Portugal.⁴² On 5 December 1834 Wellington both approved the division of the Colony upon the basis of Mitchell's Map, and further agreed to its private publication.⁴³ In addition, the Duke approved the purchase of twenty copies for the NSW Public Service as well as the sale of 200 copies at one pound each in New South Wales and in London.⁴⁴

In letters home, Mitchell ascribed Bourke's refusal to allow publication without permission of the Secretary of State to personality and party politics. He called Bourke a 'vile Whig' who recognised the superiority of Mitchell's map over those of Oxley and others but determined the profit should go to the public treasury because Mitchell was a Tory.⁴⁵ However, responding to Mitchell's letters pressing his case, Hay explained that 'it has been the invariable rule of this Department to permit no officer in its employment to publish for his own benefit, the result of any labour undertaken in pursuance of his public duties [...]

⁴⁰ *HRA: Series 1*, vol. 16, 387.

⁴¹ Mitchell to Holden, 14 May 1834, Mitchell, Sir T. L., Papers 1830-1839, CY Reel 243, Vol. 3 A292 (SLNSW), 272-5.

⁴² Foster, *Sir Thomas Livingstone Mitchell*, 208.

⁴³ Wellington to Bourke, 5 December 1834, *HRA: Series 1*, vol. 17, 596.

⁴⁴ *Ibid.*

⁴⁵ Mitchell to his mother, 26 September 1834, Mitchell, Sir T. L., Papers Miscellaneous, CY Reel 247, Vol. VII A295 (SLNSW), 48-49.

without at least his first obtaining the permission of the Home Government to do so'.⁴⁶ Mitchell appears to have understood differently and it seems unlikely the rule was as clear as Hay suggests, particularly in relation to mapmaking. Certainly, the East India Company had sought to enforce proprietary rights over maps and surveys it had funded, but also allowed James Rennell to publish his *Bengal Atlas* and other maps of India in the early 1780s to reward him for his service.⁴⁷ During the Napoleonic Wars the Company was also concerned to keep its geographic information secret from its enemies, but even after it ended it instructed Company officials not to publish maps for their personal gain.⁴⁸ However, as Drown points out, there is no mention of such a rule in the Colonial Office's guidelines for officials, published in 1837, and Mitchell himself seems to have furnished Hay with examples where a different approach had been taken.⁴⁹ Yet, again in 1855, the Commissioners of Inquiry returned to the point, suggesting that the Government had 'failed to recognise the well-established and well-understood rule, that the results of the labour of a public officer, in the discharge of his duties, are the property of the public alone'.⁵⁰

Even with permission to sell the map on his own account, the map was far from making the fortune Mitchell had anticipated. Thus, perennially short of money, Mitchell was far from pleased when two years later Robert Dixon published his own map of the nineteen counties.⁵¹ Dixon had worked for Mitchell on the Trigonometrical Survey, and was one of

⁴⁶ Hay to Mitchell, 5 February 1835, Mitchell, Sir T. L., Papers 1830-1839, CY Reel 243, Vol. III A292 (SLNSW), 231.

⁴⁷ Edney, *Mapping an Empire*, 142-3.

⁴⁸ Edney, *Mapping an Empire*, 144.

⁴⁹ Drown, 'Apparatus of empire', 184; Hay to Mitchell, 5 February 1835, Mitchell, Sir T. L., Papers 1830-1839, CY Reel 243, Vol. III A292 (SLNSW), 231.

⁵⁰ Votes & Proceedings, *Report of the Commissioners appointed to inquire into the Surveyor General's Department*, 'Report', 2.

⁵¹ Robert Dixon, *This map of the Colony of New South Wales exhibiting the situation and extent of the appropriated lands including the counties, towns, villages reserves etc: compiled from authentic surveys &c. is*

the few surveyors of whom Mitchell entertained a good opinion, writing to Under-Secretary Hay in 1832 that Mr Dixon was 'almost the only individual on whose angles I have any reliance'.⁵² Four years later, however, Dixon was granted leave and, while returning to England, passed his time on board ship in drawing up his own map of the colony. Dixon dedicated his map to Sir John Barrow, an acclaimed explorer and another founder of the Royal Geographical Society, although not as closely connected with the government as Mitchell's dedicatee, Stanley. In London it was printed and sold by Joseph Cross, yet another founding member of the Royal Geographical Society and a rival to Mitchell's map seller Gardner.⁵³

James Drown points out that Dixon's map had a number of advantages over Mitchell's. It was bigger, more colourful and printed on a single page. Importantly, it also dispensed with the intricate topographical information in favour of a cadastral layer. This showed the larger individual properties, as well as shading the more populous areas around Sydney and the Cumberland Plain. Dixon's map was thus more obviously commercial, in that it was squarely aimed at settlers and their interests. It seems to have been more commercially successful too, with a second edition published in 1841, a third in 1842 and a fourth in 1847. At two pounds, it was also sold at twice the price of Mitchell's.⁵⁴

respectfully dedicated to Sir John Barrow Bart. President of the Royal Geographical Society &c. &c. &c. and by his obliged humble servant/Robert Dixon; engraved by J. & C. Walker (London: Joseph Cross, 1837).

⁵² Mitchell to Hay, 22 September 1832, Mitchell, Sir T. L., Papers 1830-1839, A2146 (SLNSW), 282-87

⁵³ Dixon to Stanley, 22 September 1842, *HRA: Series 1*, vol. 22, 332. See also John Brock, 'A Tale of Two Maps – NSW in the 1830s by Mitchell and Dixon: Perfection, Probity and Piracy!' Paper for the NZ Institute of Surveyors Conference, Darwin, 23-25 August 2006, http://xnatmap.org/adnm/conf_06_11/c06/aPaper%2005.pdf (last accessed 4 August 2007)

⁵⁴ 'Joseph Cross, engraver', 3 December 2012, <https://londonstreetviews.wordpress.com/2012/12/03/joseph-cross-engraver-2/> (last accessed 28 July 2017).

What is interesting is that these disputes over the ownership and copying of maps may have raised issues that we would today associate with copyright law, but copyright law is not directly referred to by any of the parties. In Britain, engravings had been protected against unauthorised copying since 1735, and maps were specifically protected under laws passed in 1767 and 1777.⁵⁵ There were conflicting views as to whether these statutes applied in the colonies, a question which was not clarified until 1868.⁵⁶ Yet, while Mitchell does not seem to have referred specifically to copyright law, he was considerably interested in the question of unauthorised reproduction. In 1834 he wrote to Governor Bourke's private secretary:

How the publication may remunerate me is uncertain, but the production of a work of permanent utility, has been my chief object; and all I have to ask of the Government is, that no person may be permitted to publish from the copy of my map, now sent hence, any map likely to affect the sale of those copies thereof which I am preparing to send home for publication and sale.⁵⁷

Bourke passed on the request to Stanley, writing

I beg leave to add that, in order to render the proposed sale by the Surveyor General of any value, it will be necessary to give directions at the Colonial Office that the Copies of the Map, now transmitted, be kept out of the hands of any Printers or

⁵⁵ *An Act for the encouragement of the Arts of designing, engraving and etching historical and other Prints, by vesting the Properties thereof in the Inventors and Engravers, during the Time therein mentioned* 8 Geo II c. 13 (1735); *An Act to amend and render more effectual an Act made in the eighth Year of the Reign of King George the Second, for Encouragement of the Arts of Designing, Engraving and Etching Historical and other Prints; and for vesting in, and securing to Jane Hogarth, Widow, the Property in certain Prints* 7 Geo III c. 38 (1767); *An Act for more effectually securing the property of prints to inventors and engravers, by enabling them to sue for and recover penalties in certain cases* 17 Geo III c. 58 (1777).

⁵⁶ Catherine Bond, "'Cabined, cribbed, confined, bound in': Copyright in the Australian colonies" in *Research Handbook in the History of Copyright Law*, eds. Isabella Alexander and H Tomás Gómez-Arostegui (Cheltenham, UK: Edward Elgar, 2016), 372-90.

⁵⁷ Mitchell to Holden, 14 May 1834, Mitchell, Sir T. L., Papers 1830-1839, CY Reel 243, Vol. III A292 (SLNSW), 274.

Publishers of Maps or other Persons likely to anticipate the Surveyor General's design.⁵⁸

The Duke of Wellington acceded to the request, noting he had undertaken that 'care will be taken that the object [...] is not defeated by permitting any part of its contents to be pirated by any printer or publisher of maps in this Country'.⁵⁹

These letters also suggest that both Bourke and Wellington were familiar with the problem of unauthorised copying, known even at that time as 'piracy'. Moreover, Mitchell also seems aware of copyright's legislative requirements. On the base of each copy of his map, Mitchell has engraved the following statement: 'SYDNEY. Drawn by T L Mitchell. Engraved by John Carmichael. Republished in London. 1834'.⁶⁰ It is worth looking at this statement a bit more closely. In Britain, such publication lines were necessary to secure the rights under the Engravings Acts.⁶¹ Unlike the case of books, engravings did not need to be registered to secure protection, but they did need to include the name of the proprietor on each plate and it had become customary to also include the date so as to determine the duration of protection (twenty eight years).

What could Mitchell mean by including such a line? The very acknowledgement of the map having been published in Sydney would seem to preclude the operation of the British Acts and it is notable that no publisher's name is included. However, it is possible that the claim

⁵⁸ Bourke to Stanley, 5 May 1834, *HRA: Series 1*, vol. 17, 419.

⁵⁹ Wellington to Bourke, 5 December 1834, *HRA: Series 1*, vol. 17, 596.

⁶⁰ Thomas Mitchell, *To the Right Honourable Edward Geoffrey Smith Stanley this map of the Colony of New South Wales compiled from actual measurements with the chain & circumferenter, and according to a trigonometrical survey is (with greatest respect), dedicated by his most obedient humble servant T.L. Mitchell, Surveyor General/drawn by T. Mitchell; engraved by John Carmichael* (Sydney, republished in London, 1834).

⁶¹ *An Act for the encouragement of the Arts of designing, engraving and etching historical and other Prints, by vesting the Properties thereof in the Inventors and Engravers, during the Time therein mentioned* 8 Geo II c. 13 (1735), s.1.

that the map was ‘republished in London’ was designed to suggest that copyright might apply – in other words, it acted as a notice to deter potential ‘pirates’. Given the general lack of understanding of the technicalities of the law at the time, it was a strategy that was likely to succeed. Nevertheless, there is little evidence that the map was indeed republished in London as it does not feature in lists of Gardner’s published works, although there is evidence it was sold in London at least by Joseph Cross. Mitchell published several other works, including accounts of his travels and maps of the Peninsular War battlefields, working with such prominent London publishers as James Wyld and John Arrowsmith, and his correspondence demonstrates his interest in his contractual arrangements with them.⁶² He also took out a patent for his ‘boomerang propeller’ for use on boats and steamships.⁶³ He seems to have been an astute commercial operator and so it is not too far-fetched to speculate he was gesturing towards copyright protection with his publication line.

Of further interest is the statement that the map was drawn by Mitchell and engraved by Carmichael. Carmichael, who was deaf and dumb, had been apprenticed to the engraver John Horsburgh in Edinburgh, and arrived in Sydney as a free settler in 1825. From 1829 he had been employed as an engraver in the Surveying Department and for a period in the 1830s he lived in Mitchell’s own house.⁶⁴ For his work on the Map of the Nineteen Counties, Mitchell paid him 200 pounds out of his own pocket. However, as Mitchell wrote to Under Secretary Hay, he had been himself ‘obliged to etch the hills and ranges as few engravers,

⁶² For example, Mitchell to Arrowsmith, 17 November 1837, Mitchell, Sir T. L., Papers 1830-1839, CY Reel 243, Vol. III A292 (SLNSW), 348; Mitchell to Murray, 19 December 1837, Mitchell, Sir T. L., Papers 1830-1839, CY Reel 243, Vol. III A292 (SLNSW), 373-4; Mitchell to Murray, 20 November 1842, Mitchell, Sir T. L., Papers 1840-1849, CY Reel 244, Vol. IV A293 (SLNSW), 279-81.

⁶³ Foster, *Sir Thomas Livingstone Mitchell*, 449.

⁶⁴ Karen Eaton, ‘John Black Carmichael (1803-1857), artist and engraver [2015] *Australiana* 6, 11.

even in London, can do this satisfactorily'.⁶⁵ Mitchell's willingness to share credit for his map with Carmichael varied. In May 1834 he wrote to Hay that 'by my hand alone has the original map been drawn and finally etched on copper.' But the following July he wrote 'I have employed an engraver for several years until I have taught him, tho' deaf and dumb, to engrave hills [...] the trouble I have had with this engraver to produce a map which I could own.'⁶⁶

The UK Engravings Acts gave property rights to those who did 'invent and design, engrave, etch ... or cause to be designed and engraved, etched...'⁶⁷ Mitchell's statement line did not establish ownership of the map, even in British terms, but it did share the credit between its drafter and its engraver. And, as we know, credit was important to Mitchell. As Governor Bourke wrote to Stanley, Mitchell was desirous to 'obtain whatever reputation as a geographer and an artist that the production of such a work, certainly of no ordinary merit, may obtain for him'.⁶⁸ It is significant, therefore, that he enshrined Carmichael's contribution in print, even if it had no legal effect.

Dixon's map might have challenged Mitchell's map in the market, but, even if Mitchell's map had been protected by copyright, it may not have amounted to a copyright infringement if Dixon was working from his own surveys, diaries and notes rather than copying Mitchell's map (although Mitchell believed he had copied it).⁶⁹ In any event, like Mitchell, he was in breach of the somewhat nebulous 'rule' not to profit from his

⁶⁵ CO 201/236 Mitchell to Hay 4 October 1833 (PRO).

⁶⁶ CO 201/244 Mitchell to Hay 17 May 1834 and 20 July 1834 (PRO).

⁶⁷ 1767 Engravings Act, s1.

⁶⁸ Bourke to Stanley, 5 May 1834, *HRA: Series 1*, vol. 17, 419.

⁶⁹ Votes & Proceedings, *Report of the Commissioners appointed to inquire into the Surveyor General's Department*, 'Evidence', 9.

government position. However, even without the assistance of a copyright statute, Mitchell could still take action against his displeasing subordinate. Upon Dixon's return to Australia, Mitchell suspended him, but later Dixon was reinstated and sent to survey the Moreton Bay district. Here, he once again published a map of that district without authority. Having fallen out with the military command, he was dismissed from the service, something which Mitchell made no attempt to prevent.⁷⁰

This is not the only case where government surveyors sought to make use of the information they gathered, and to some extent controlled, for their private purposes but it is the most high profile one. What is interesting about the disputes surrounding Mitchell's Map of the Nineteen Counties is that they illuminate the importance of something that has been largely overlooked by those investigating the relationship between maps, property and land: the ownership of the map itself. In the early years of the colony, the British Government's chief goal was to ensure that the land was surveyed in order that it could be identified, sold and settled. A survey but not a map was required for this but, if a map were to be produced, the Government's preference was that it be done in Britain. The question of who was allowed to make the map is intimately linked to the more important matter of establishing the Crown's authority to determine property rights. Central to establishing this authority is ensuring that these rights are determined upon a proper, scientific basis. This is what Mitchell's Map sought to establish. As Alain Pottage has observed, 'There is an essential distinction between the understandings which arise from the possession or use of land, and which support the attribution or recognition of property rights, and those which

⁷⁰ Gipps to Stanley, 27 October 1842, *HRA: Series 1*, Vol. 22, 332. See also Ray Evans & William Thorpe, 'The last days of Moreton Bay: Power, sexuality and the misrule of law' *Journal of Australian Studies* 21 (1997): 59-77.

are presupposed by cartography.’ Pottage continued, ‘What is required is a code of translation which allows property to be read into topography, or, more specifically, a certain degree in the accuracy of maps.’⁷¹ In colonial New South Wales, where land ownership could not arise from possession or use – which was indeed constructed out of dispossession – trust in the accuracy of the map was key.

However, the state was not the only one with an interest in accuracy. Mitchell was himself driven by personal ambitions to create a map that would establish him as an authoritative and respected geographer, and his reluctance to place himself in a subservient relationship with the Colonial Office due to his class background. The matter of whether the map was the result of a true trigonometrical survey is also relevant to Mitchell’s perception of himself as the consummate modern mapmaker, using the latest mathematical and scientific methods to ensure accuracy. Such claims were also important to imperial ideology – the objective, scientific method of acquiring and depicting knowledge of the territory validated the British claims of sovereignty by demonstrating the superiority of their knowledge over that of the native, unscientific inhabitants. Yet, as was the case in Britain’s other colonies, particularly India, the ideal fell short of the reality, undercut by physical challenges of the terrain and the great expense involved.⁷² While Stanley had condemned Mitchell in 1834 for carrying out a trigonometrical survey without permission, a Commission of Inquiry set up by Governor Denison in 1855 condemned the survey for its inaccuracies. As Lord Audley later wrote, ‘where Mr Stanley had found Sir Thomas *too* trigonometrical, the new inquiry tended to doubt whether he had been trigonometrical *at all*’.⁷³

⁷¹ Pottage, ‘Measure of Land’, 362-3.

⁷² Edney, *The Irony of Imperial Mapping*; Edney, *Mapping an Empire*.

⁷³ George Edward Audley, *The Public Surveys of New South Wales* (Sydney, 1866), 19.

It is clear from Mitchell's letters that he sought to be rewarded for his efforts; indeed, he wanted not just to cover his costs but also to make his fortune and his reputation with his Map of the Nineteen Counties. In one letter to the Governor he mentioned the example of Buchette, the Surveyor-General of Lower Canada, whom Mitchell alleged was given a sum of money by the Canadian Legislative Council as a reward for his efforts.⁷⁴ In another letter to his brother John he complained that nobody 'with a spark of talent' will enter public service if they cannot profit from their efforts.⁷⁵ In 1855 he explained that his knightship was conferred to 'obliterate' the King's unjust blame of him in 1833.⁷⁶ Finally, it is also noteworthy that Mitchell also saw his map as playing a role in encouraging the production of useful knowledge, in particular the enlargement of geographical knowledge. He further sought to point out his contribution to mapmaking methods, in one letter describing how he had adopted a new engraving technique for the depiction of hills.⁷⁷

Dixon's activities threatened Mitchell's claims to both financial reward and scientific fame.

As Mitchell complained in 1855:

I had the mortification to see my own survey, effected by my own personal labors in this manner – which trouble as Surveyor General I had no business to take – pirated by a subordinate of my own office ... and this pirated work was published under the

⁷⁴ Mitchell to Holden, 14 May 1834, Mitchell, Sir T. L., Papers 1830-1839, CY Reel 243, Vol. III A292 (SLNSW), 274.

⁷⁵ Mitchell to John Mitchell, 30 March 1835, Mitchell, Sir T. L., Papers 1830-1839, CY Reel 243, Vol. III A292 (SLNSW), 247.

⁷⁶ Votes & Proceedings, *Report of the Commissioners appointed to inquire into the Surveyor General's Department*, 'Evidence', 5.

⁷⁷ Mitchell to Holden, 14 May 1834, Mitchell, Sir T. L., Papers 1830-1839, CY Reel 243, Vol. 3 A292 (SLNSW), 274.

sanction of the President of the Royal Geographical Society of London, whilst the sale of my official map was prohibited in the Colony.⁷⁸

The disputes over controlling the production and dissemination of Mitchell's Map reveal the interplay between the imperial goals, commercial objectives and scientific aspirations.

Mitchell's Map was important to Britain because it would provide the basis for controlling the allocation of property rights, thereby further tightening their hold over the new territory, but for Mitchell and probably also Dixon, it was also a vehicle for personal ambition and financial security. These objectives could work together, and copyright law would enable that by rendering the right to reproduce the map as also proprietary in nature. However, while the lack of definition between private and public duties, and the hope of personal reward, could incentivise Crown officers to work harder to fulfil imperial goals, the case of Mitchell's Map shows it could also lead to tensions in relation to the allocation of those proprietary reproduction rights. The link between scientific aspirations, colonial policy and copyright law is picked up in the next case study, to which this article now turns.

The Piracy of Proeschel's Goldfields Map

Colonial commercial map-making took off when gold was discovered in Victoria in 1851.

The gold rushes resulted in an influx to Melbourne of people including surveyors, draftsmen, engravers and lithographers, as well as a new demand for information on how to get to the goldfields and what one might expect to find there in terms of available and unavailable

⁷⁸ Votes & Proceedings, *Report of the Commissioners appointed to inquire into the Surveyor General's Department*, 'Evidence', 10.

claims.⁷⁹ Frederick Proeschel, an upholsterer and mattress maker by trade, arrived in Melbourne in December 1852. Proeschel's reasons for travelling to Melbourne are not known, nor why he turned to map making. However, by 1853 he was sharing premises with the lithographer James Buckingham Philp, who had already produced a map of Melbourne. In the middle of that year, Proeschel published his first map, which was lithographed by Philp, and entitled the *Pocket Map of the Roads to all the Mines in Victoria*.⁸⁰

In making this map, Proeschel seems to have been inspired by Thomas Ham's 1852 large-scale map of the routes to the goldfields of Mount Alexander and Ballarat. Proeschel, however, is more likely to have copied Ham's *Squatting Map of Victoria*, which he published in 1851, copying from it the place names and physical features, and then inserting the roads. However, where Ham's map was 19 miles to an inch, Proeschel's was 23 miles to an inch, making it more portable and easier to use. Proeschel sold it at different prices for different formats, including on paper and on canvas.⁸¹

Proeschel was proud of his map, sending nine copies to the Colonial Secretary and suggesting that copies be purchased for all departments and Government officers. The map received favourable reviews in local newspapers. The *Argus* called it 'the most valuable publication of the kind that we have seen in the colony'. It admired the way it presented new mines and new diggings, and coloured the auriferous area in different colours to make it clear how far it was from town. All in all, it considered it 'a useful vade mecum, not only to

⁷⁹ T. A. Darragh, 'Commercial Map Publishing in Nineteenth Century Melbourne', *Globe* (Melbourne) 27 (1992): 74.

⁸⁰ T. A. Darragh, 'Frederick Proeschel, Colonial Map Maker', *Bibliographical Society of Australia and New Zealand Bulletin* 15(3-4) (1992): 108.

⁸¹ Darragh, 'Frederick Proeschel', 109.

diggers but to the public at large'.⁸² The *Herald* was more circumspect, observing that it was 'rather roughly finished' but would nevertheless be useful to 'digging travellers, particularly the numerous class of "new chums", whose knowledge of the geography of Victoria is generally sufficiently vague'.⁸³

Late in July 1853 Proeschel published his second map, entitled *The most complete popular & mercantile map of Melbourne, Victoria*, also lithographed by Philp. But soon after this map was published Philp issued a new copy of Proeschel's *Pocket Map* of goldfields roads. It is clear that the map is a copy, despite its more polished appearance and modified title.

Proeschel was furious. He wrote a long letter to the Colonial Secretary in French, which commenced 'Monsieur, Permettez moi l'honneur de vous exposer que l'absence de la loi des droits d'auteur dans cette colonie, est un grand obstacle a l'avancement de ses progrès artistiques'.⁸⁴ He went on to explain that the arts were fundamental to the development of everything agreeable, in good taste and the establishment of good society and finished by impressing upon the Secretary that the arts were the foundation of the colony's future prosperity.⁸⁵ The answer to Proeschel's letter, noted on the file, was that the Colonial Secretary regretted that in the absence of such a law, nothing could be done.⁸⁶

The *Argus* also picked up on Proeschel's objections, writing that 'he complains of piracy and the want of a copyright law, but we trust that a sense of decency and the power of public

⁸² *Argus*, 1 July 1853, 9.

⁸³ *Herald*, 6 July 1853. Quoted in Darragh, 'Frederick Proeschel', 109.

⁸⁴ Proeschel to Colonial Secretary, 11 October 1853, PROV Series 1189 D53/10/166. In English: 'Sir, Permit me the honour of exposing to you the lack of a copyright law in this colony is a large obstacle to artistic progress.'

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

opinion, will restrain or defeat such unworthy practices'.⁸⁷ Proeschel's call for the introduction of copyright law to address the problem of piracy might appear incongruous, given that Proeschel's map was itself heavily reliant on the earlier work of Ham. However, Proeschel, unlike Philp, had made material alterations to Ham's map. In particular, he had produced it on a smaller scale, included distance tables and inserted the roads in a more legible manner. Proeschel was acutely aware of the precarious financial position of the mapmaker, and recognised that some form of government assistance was needed for such works to be produced. His letter enclosing the copies of the maps (sent the same day as his complaint about piracy) urged the government to assist him by purchasing copies for government offices and those in charge of expeditions, as the expense to the government would be insignificant compared to the usefulness of the maps, while at the same time it would give encouragement to their author and allow him to engage in other works which would be useful to the colony.⁸⁸

According to the *Argus*, Proeschel was so disheartened by the piracy that he abandoned mapmaking for a short while, but recommenced again in 1855, producing maps of Collingwood, Richmond and North Melbourne.⁸⁹ His reputation was such that by 1856, the *Argus* was referring to him as 'the Wyld of Victoria'.⁹⁰ Proeschel moved on to produce several maps of Victoria, before turning to map the other colonies. In the early 1860s he began the task of producing an atlas of the entire country. Only two atlases had been published by that time, and both were out of date.⁹¹ The *Atlas of Australia* was published in

⁸⁷ *Argus*, 17 September 1853 (SR Vic).

⁸⁸ Proeschel to Colonial Secretary, 10 October 1853, PROV Series 1189 unit 231 D53/10.165.

⁸⁹ Newspaper clipping, source unknown, PROV Series 1096, unit 2 P23/57.

⁹⁰ *Argus*, 7 May 1856 (SR Vic). James Wylde was a leading London mapmaker of the day.

⁹¹ Darragh, 'Frederick Proeschel', 142-144.

1863, and the *Argus* called it 'the most complete geographical work yet produced in the colonies'.⁹² Proeschel wrote to the Chief Secretary of Victoria that the *Atlas* had cost him 3000 pounds to publish.⁹³ On the title page, Proeschel claimed he had been awarded a gold medal for the best map of Victoria as well as several silver medals. Even more importantly, he included a statement that the *Atlas* had been entered at Stationers Hall, London, in 1863.⁹⁴ He wrote to various government officials drawing their attention to the map, evidently expecting them to buy copies. When the Chief Secretary of Victoria, John McCulloch, did not respond, Proeschel sent him another letter, saying sadly: 'I regret that I shall not be able to mention that arts are always supported in Victoria'.⁹⁵

Proeschel's next mapping project was to embark on a series of world maps (mappes mondes) tracing the history of exploration. He wrote to the Chief Secretary of Victoria in February 1864, suggesting that the government might support this project by buying a few hundred copies of his *Atlas* 'for distribution to the public libraries, mechanics or other public institutions all over Great Britain'.⁹⁶ Proeschel proposed that he would travel around Britain, and other European countries, delivering lectures based upon his exploration maps. In this way, Proeschel could assist the government in increasing immigration to the colony, because his lectures and maps would 'widely diffuse the required Knowledge upon the Country, and by that contribute to the present want of population'.⁹⁷ The Chief Secretary

⁹² Darragh, 'Frederick Proeschel', 149.

⁹³ Proeschel to Chief Secretary, 2 February 1864, PROV Series 3991 unit 58 64/E1076; 11 August 1863, PROV Series 1189 unit 854 63/B5915.

⁹⁴ Title page of *Atlas* enclosed with letter from Proeschel to the Chief Secretary of Victoria, 2 Feb 1864, PROV Series 3991 unit 58 64/E1076. Darragh confirms that the statement that the map was entered at Stationers Hall is correct: Darragh, 'Frederick Proeschel', 151.

⁹⁵ Proeschel to Chief Secretary, 11 August 1863, PROV Series 1189 unit 854 63/B5915.

⁹⁶ Proeschel to Chief Secretary, 2 February 1864, PROV Series 3991 unit 58 64/E1076.

⁹⁷ *Ibid.*

responded he could not comply with Proeschel's request.⁹⁸ Three weeks later, on 25 February 1864, Proeschel left Victoria for London and never returned to Australia. He died in May 1870, leaving chattels worth 40 francs and an investment in the name of his wife worth 241 francs 66 centimes.⁹⁹

Proeschel's career as Victoria's only professional mapmaker did not earn him a fortune. However, he does seem to have developed a successful business for a number of decades. He adopted the business strategy of attracting subscribers to his maps by printing their names and businesses in the margins or accompanying reference books.¹⁰⁰ He travelled widely, and he also corresponded with and sought the assistance of the various surveyor-generals in compiling the information for his maps.¹⁰¹ However, his attempts to attract government patronage were less than successful and seem to have left Proeschel embittered by his failure to interest the government in the arts. Like Thomas Mitchell, Proeschel considered himself a man of science, and in 1857 applied for patents for a crushing machine and methods for extracting quartz from gold.¹⁰² He urged the government of Victoria to hold a local exhibition to show off its industrial progress prior to the London Exhibition of 1862, and was a member of the Royal Society of Victoria.¹⁰³ While mapmaking was a commercial enterprise for him, it also reflected his broader involvement and interest in the colonies' artistic and industrial progress. His advocacy for a copyright law should thus be seen in this context, as well as in terms of his own financial interests.

⁹⁸ Ibid.

⁹⁹ Darragh, 'Frederick Proeschel', 156-158.

¹⁰⁰ Darragh, 'Frederick Proeschel', 158.

¹⁰¹ See for example a letter from Proeschel to the Surveyor-General of Victoria, asking permission to make a copy of a map and referring to assistance he has received from the department in the past: 12 Jan 1859 PROV Series 44 unit 637 59/A270.

¹⁰² Darragh, 'Frederick Proeschel', 120. Note that the patents were never granted.

¹⁰³ Darragh, 'Frederick Proeschel', 120-121.

Copyright legislation and map litigation

Proeschel may have been adding his voice to those of photographers and some few others, calling for a local copyright law in the 1850s, but little happened for some time. In 1862, the question of introducing a local copyright law was raised in the Legislative Assembly.¹⁰⁴ The Minister of Justice responded that

there was not perhaps, likely to be a great amount of authorship in the colony, at least for some considerable time; still, as some useful works might be published – such as gazetteers, maps, almanacs &c – it might be desirable to have a copyright law here.¹⁰⁵

However, it was to be another seven years before a copyright statute was passed.¹⁰⁶ The statute included maps amongst the works to which it gave protection, and three years later, one of the first cases to be brought under the Act did indeed involve a map.

The map in question was also a map of the goldfields. In 1872, Samuel Peach Hogg (variously described in newspaper reports as a miner, auctioneer and broker who later went into condiment making) accused estate agents and auctioneers Knipe and George, and surveyor Nathaniel Munro, of copying his mining map of Sandhurst.¹⁰⁷ According to Hogg, he had engaged the surveyor Roberts to produce a map of the district, partly by survey and partly from information and maps held in the warden's office at Sandhurst, after obtaining

¹⁰⁴ Victorian Hansard, Friday 5 December, 1862, Session II, 1862-3, vol. IX, 191.

¹⁰⁵ Victorian Hansard, Wednesday 10 December, 1862, Session II, 1862-3, vol. IX, 212.

¹⁰⁶ An Act to secure to Proprietors of Designs for Articles and Works of Manufacture and Art, and to Proprietors of Works of Literature and Fine Art, the Copyright of such Designs and Works for a limited period (1869) 33 Vict. no. 350.

¹⁰⁷ Munro died in 1904 and the *Age* reported his death, stating he was a man 'addicted to drink' who died after sustaining a fracture of the skull following an altercation over tobacco. The *Age* noted he was a surveyor who 'at one time was very well known in Melbourne.' *Age*, 17 December 1904, 12.

permission from the Minister of Mines. Hogg was not a professional mapmaker – he described his mapmaking as ‘an old hobby of mine’.¹⁰⁸ The *Bendigo Advertiser* called his map ‘the most valuable publication of the kind that has ever appeared in connection with this district’ and claimed it had cost him nearly 500 pounds to produce.¹⁰⁹ On 15 August 1871, Hogg registered his map in the relatively new Copyright Register.¹¹⁰

In November 1871, however, the *Bendigo Advertiser* heralded the arrival of a new map on the scene, which ‘supplies a desideratum which we ourselves sometime since pointed out, being on a small scale, and so capable of being used wither as a pocket map or to have on walls, where the dimensions of Hogg’s map would prove too large’.¹¹¹ This was the map produced by John Hanlon Knipe and his business partner E H George.¹¹² In January 1872, Hogg brought an action against the Knipe and George, and the case went before the Melbourne District Court.

The factual dispute before the court was whether the defendant’s map was copied from the plaintiff’s, or whether both were copied from the same sources, namely the mining maps held by the Mining Department. The defendants argued that Hogg’s map was entirely copied from maps held in the Mining Department, and that Munro’s map was different to Hogg’s, in being larger and more up to date. Giving evidence, Munro denied having copied

¹⁰⁸ *Age*, 12 January 1872, 3.

¹⁰⁹ *Bendigo Advertiser*, 20 September 1871, 2.

¹¹⁰ Register of Proprietors of Copyright of Literary, Dramatic and Musical Productions, 15 March 1870 – 25 March 1877, A1187.1 (NAA).

¹¹¹ *Bendigo Advertiser*, 16 November 1871, 2.

¹¹² Knipe arrived in South Australia in 1853, aged 25 and joined an auctioneering firm. We travelled to the gold fields in Bendigo in 1854, but having little luck as a digger returned to the business of auctioneering and land speculation: ‘John Hanlon Knipe’, <http://adb.anu.edu.au/biography/knipe-john-hanlon-3967/text6259> (last accessed 28 July 2017). Less is known of E. H. George but he seems to have formed an estate company with Knipe, as the map of Sandhurst carries the name Knipe George & Co, while a second map, held in the State Library of NSW, is of St James Park, said to be sold by agents Knipe George.

Hogg's maps.¹¹³ However, evidence that errors made in Hogg's map appeared in Munro's, appeared to tip the case in Hogg's favour and the Court fined the defendants 4 pounds and ordered them to pay 4 pounds, 4 shillings in damages.

The case caused something of a stir in the local community, being reported on a number of times in the *Bendigo Advertiser*. However, the controversy also reached the Melbourne papers, with the *Age*, the *Advocate* and the *Leader* featuring articles considering the case and its broader implications. Both Hogg and Munro also wrote letters to the *Age's* editor, pressing their sides of the argument. Outside the courts, the issue became the broader one of how anyone could claim to have copyright in something they had compiled from publicly available information. The writer in the *Age* expressed concern at Hogg's ability to register the copyright in work substantially copied from a Government map, writing that Hogg had made use of the property of the Mining department, and under cover of protecting the additions he had made to it, placed the whole production under copyright law, and barred, as he hoped, any one in future from making commercial use of a Government map, which had probably cost the Mining department several thousand pounds to produce.¹¹⁴

The *Age* referred to an earlier copyright case involving photographs, *Nettleton v Pyrke*.¹¹⁵ Nettleton was a photographer who had been one of the chief lobbyists in favour of the Act and the first person to bring an action under it.¹¹⁶ While the facts of that case involved a lithographic copy of a photograph, the *Age* argued that the law would prevent two

¹¹³ *Bendigo Advertiser*, 10 January 1872, 2.

¹¹⁴ *Age*, 10 January 1872, 2.

¹¹⁵ Unreported, appealed at *Pyrke v Nettleton* [1872] VicWABWRp 14.

¹¹⁶ *Leader*, 17 April 1869, 12.

photographers taking photographs of the same street view, a result it deplored. The result of Hogg's case against Munro, Knipe and George, said the *Age*, was the same and of even 'graver consequences'.¹¹⁷ The *Age* contended that Hogg had no right to register his map as 'Registration should be strictly confined to the handiwork of an artist, and should not include anything that is common property.' If this were not understood, 'there will be a stop to all improvements in maps and many other things'.¹¹⁸ The *Leader* went still further and argued that '[i]t would be well if the rule were laid down that no copy of a map, plan, picture, photograph or design should be protected for trade purposes by copyright law'.¹¹⁹

The *Bendigo Advertiser*, on the other hand, considered that the case of maps was completely different to that of photographs. It disputed the claim that the Copyright Act would prevent someone from photographing the same scene as another person, and that in any event photographers required little protection, while mapmakers invested 'an immense deal of labor and research...and nothing could be more unfair than to permit others to take advantage of his enterprise for the purposes of profit'.¹²⁰ The *Advertiser* was content with the result, stating '[i]t seems to us that the first production of a useful plan or map, by which the public is considerably benefited, is entitled to be regarded in some measure as an invention'.¹²¹ Its writer considered that a copyist should have to demonstrate a 'superiority of workmanship' to escape legal penalty.¹²²

Conclusion

¹¹⁷ *Age*, 10 January 1872, 2.

¹¹⁸ *Age*, 10 January 1872, 2.

¹¹⁹ *Leader*, 17 April 1869, 12.

¹²⁰ *Bendigo Advertiser*, 11 January 1872, 2.

¹²¹ *Ibid*

¹²² *Ibid*.

Surveys and maps were used from the earliest days of European settlement in Australia to identify territory, to appropriate land and to establish property rights, but as time passed different kinds of maps were made, and those making them did so for a variety of additional purposes. Some were personal, as with Mitchell's desire to present himself as a man of science; others were more publicly minded, as in the case of Proeschel's plans to use maps to encourage arts and sciences in the new colonies, and to attract new settlers. For the auctioneers and estate agents like Hogg, Knipe, and George, maps were necessary to their business of estate sales. But while the law of property may have made the link between the map and the land it depicted clear, less certain was the question of ownership of the map itself and, in particular, the information it contained.

An examination of three different incidents involving disputes over maps that took place over a thirty year period in colonial Australia, and paying attention to ways that claims of ownership and reproduction of those maps were framed, highlights some of the complexities of imperial map-making, in particular the synergies and tensions that arose between imperial goals and commercial objectives. Both Mitchell and Proeschel sought to place pressure on the government to offer rewards, provide financial incentives, and encourage the production of useful knowledge. These concerns overlapped with the imperial objectives of the British state. For the imperial authorities, surveys and maps were essential to the production of a coherent and recognisable territory that could be claimed by the Crown and subjected to proprietary rights for settlers and, later, prospectors. Despite the difference between Mitchell's office of civil servant and Proeschel's role of entrepreneur, both men ascribed to imperial ideals and the role of maps in achieving them, while perceiving the need for greater state assistance in bringing them about.

In this way, we can see that the norms and rules of copyright law act as yet another technology of empire. The map provides the essential link between territory and sovereignty, and between land and property, allowing the land to be identified, allocated and commodified. It thus completes the process of dispossession of the original inhabitants and possession by the Crown. The map that Mitchell produced established the early limits of settlement and later became the basis of the land registration system, while the goldfields maps were important for identifying and dealing with mining claims. The maps therefore also facilitated the trade in land titles that was crucial to the developing economy. However, as noted above, for this to be effective it was essential that skilled persons be encouraged to make those maps and that the accuracy of such maps could be trusted.¹²³ Copyright law provided incentives to make maps by allowing owners to make and sell them, confident that they could prevent others from copying and undercutting their investment. It also assisted in establishing accuracy and authority through identifying who had created the map and that creator's qualities or qualifications. The map's integrity would be maintained if that creator could control the map's production and dissemination.

When copyright legislation was introduced in Victoria, it was specifically expressed to cover maps and was quickly employed to adjudicate between competing claims and establish certainty of ownership. However, questions of ownership also raised other issues. As the colony of New South Wales was transforming from a penal colony run by the Colonial Office through the military into a civil society able to govern itself, the relationship between that society and the Crown was also changing. Moreover, as the state of knowledge of the land

¹²³ Pottage, 'Measure of Land', 362-3.

changed, the kind of maps needed also changed. In the 1830s, maps delineated known territory from unknown lands beyond; by the 1850s, the territory was known and maps showing changing human relations to that land became more important. Mapmaking moved from being solely a government concern to being one in which aspiring businessmen also participated. At the same time, tensions in how information was gathered and disseminated, and the role of men of science in that process, arose. The introduction of copyright law formed part of this dialogue but did not resolve it. Maps, particularly maps of the goldfields, provided a public service by revealing land that had been allocated and land that was still open to those who sought their fortunes, but arguments that the production of such maps needed to be incentivised by the grant of private rights continued to conflict with claims to public access.

The issue of ownership of maps, and the ability to control the knowledge they contain, continues to be contentious to the present day. It is not such a long distance from conflicting views of colonial mapmakers to the extended legal proceedings brought by the Copyright Agency on behalf of surveyors against between the NSW government in 2007/8.¹²⁴ The Crown argued that it was the owner of survey plans prepared for the purposes of land registration, but this failed at trial, and its further claim that it did not have to pay surveyors for any uses that they might make of survey plans submitted to them for registration failed on appeal to the High Court. In the Federal Court, Justice Emmett set out a potted description of the birth of Australian land law. Several pages later he observed: '[t]he systems of land holding in New South Wales and the statutory and regulatory framework described above depend in no manner upon the existence of the Copyright

¹²⁴ *Copyright Agency Ltd v New South Wales* (2007) 159 FCR 213; *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279.

Act'.¹²⁵ His point was that the only purpose of submitting a survey for registration is so that the State can carry out whatever acts are necessary for the purpose of the land registration system, and not to exploit them as copyright works per se. This article has sought to demonstrate that, while the system of property law in Australia does not *depend* on copyright law, the two systems are intertwined, and copyright law has played its own role as a technology of empire from the colonies' earliest days. Moreover, by tracing disputes over maps and surveys back to colonial times, the case of *CAL v NSW*, comes into focus as the latest iteration of an ongoing tension between private rights, state rights and public access.

University of Technology Sydney

¹²⁵ *Copyright Agency Ltd v New South Wales* (2007), 243.